

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

11	BARCENA CHAVEZ,)	Civil No. 09cv1976 L(JMA)
12	Plaintiff,)	
13	v.)	ORDER DISMISSING ACTION
14	CITI MORTGAGE INC., <i>et al.</i> ,)	WITHOUT PREJUDICE FOR LACK
15	Defendants.)	OF PROSECUTION AND FOR
16)	FAILURE TO SERVE COMPLAINT
)	and GRANTING MOTION TO
)	EXPUNGE LIS PENDENS [doc. #4]

Plaintiff, who is represented by counsel, filed his complaint and notice of lis pendens on September 9, 2009. A summons was issued at that time but nothing in the court's docket reflects service of process on defendants. Under Federal Rule of Civil Procedure 4(m), the complaint was required to be served no later than January 7, 2010. Failure to timely serve the complaint results in dismissal of the action without prejudice.

Further, the court may dismiss an action for want of prosecution pursuant to Civil Local Rule 41.1 which provides that "[a]ctions or proceedings which have been pending in this court for more than six months, without any proceedings or discovery having been taken therein during such period, may, after notice, be dismissed by the court for want of prosecution, at the calling of a calendar prepared for that purpose by the court." Plaintiff has taken no action since the filing of the complaint and therefore more than six months have passed since the complaint's filing.

1 On May 11, 2010, the Court set this OSC for dismissal for lack of prosecution and failure
2 to serve the complaint. On that same date, defendants GMAC Mortgage, LLC and ETS
3 Services, LLC filed a motion to expunge lis pendens that is set for hearing on July 6, 2010.

4 Plaintiff failed to appear at the order to show cause hearing to provide good cause for his
5 failure serve and to prosecute this action. Accordingly, the Court will dismiss the action without
6 prejudice.


7 Further, the Court will grant defendants' motion to expunge the lis pendens. A court
8 "shall order the notice [of pendency] expunged if . . . the pleading on which the notice is based
9 does not contain a real property claim." CAL. CIV. CODE § 405.31. A "real property claim" is
10 defined, *inter alia*, as a cause of action "which would, if meritorious, affect . . . title to, or the
11 right to possession of, specific real property. . . ." CAL. CIV. CODE § 405.4. Plaintiff bears the
12 burden of establishing, by a preponderance of the evidence, the probable validity of the claims.

13 Because the operative complaint has been dismissed for failure to effectuate service of
14 process and to prosecute this action, plaintiffs have alleged no "real property claim." The lis
15 pendens therefore is properly expunged.

16 Based on the foregoing, **IT IS ORDERED** this action is **DISMISSED** without prejudice.
17 **IT IS FURTHER ORDERED** the lis pendens plaintiff recorded on real property located at 555
18 Carrie Circle, San Marcos, California 92069 is **EXPUNGED**.

19 **IT IS SO ORDERED.**

20 DATED: June 14, 2010

21 
22 M. James Lorenz
United States District Court Judge

23 COPY TO:

24 HON. JAN M. ADLER
25 UNITED STATES MAGISTRATE JUDGE

26 ALL PARTIES/COUNSEL
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